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AIRTOUCH™
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January 7, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW Room 222
Washington, DC 20554

RE: **In the Matter of Petition for Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges To, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments filed by Southwestern Bell Mobile Systems, DA 97-2464**

Dear Ms. Salas:

AirTouch Communications, Inc. ("AirTouch") filed comments in the above-referenced docket on December 24, 1997, the original filing date. Those comments incorrectly retained a caption identifying them as privileged and confidential. Due to the extension of the comment filing date granted by the Commission's December 22, 1997 Order, please replace AirTouch's December 24, 1997 filing in this matter with the attached, corrected comments.

Thank you for your assistance. If you have any questions please contact me at (202)293-4960.

Sincerely,

Kathleen Q. Abernathy

Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
	)	
Petition for Declaratory Ruling Regarding the	)	
Just and Reasonable Nature of, and State Law	)	DA 97-2464
Challenges To, Rates Charged by CMRS	)	
Providers When Charging for Incoming Calls and	)	
Charging for Calls in Whole-Minute Increments	)	
filed by Southwestern Bell Mobile Systems	)	
	)	

Comments of AirTouch Communications, Inc.

AirTouch Communications, Inc. ("AirTouch")[1], hereby submits its comments in response to the Public Notice inviting comment on a Petition for Declaratory Ruling regarding state law challenges to certain practices of Commercial Mobile Radio Service ("CMRS") carriers.[2] AirTouch agrees wholeheartedly with the Petition that, by operation of Section 332 of the Communications Act, state courts lack jurisdiction to entertain challenges to these pricing practices under state law AirTouch also agrees that, in any event, the pricing practices are just and reasonable practices that fully comport with the requirements of the Communications Act and are established in the industry.

The Commission should grant the declaratory ruling expeditiously. Establishing clarity in the legal principles governing these issues will benefit the public by reducing the administrative burdens associated with resolving these matters on a piecemeal, and perhaps inconsistent, basis in numerous local proceedings. A prompt declaratory ruling

[1] AirTouch is a CMRS provider with interests in cellular, paging, PCS and mobile satellite services, both domestic and international.

[2] "Wireless Telecommunications Bureau Seeks Comment on a Petition for a Declaratory Ruling," DA 97-2464 (November 24, 1997); Petition for Declaratory Ruling filed by Southwestern Bell Mobile Systems (November 12, 1997)(Petition).

would benefit judicial authorities in particular. As this very proceeding points out, judges rely on the Commission's rulings and interpretations of the Communications Act in order to enter decisions. A prompt declaratory ruling could expedite their handling of these types of cases, making room for other matters on their often backlogged dockets. Finally, a prompt declaratory ruling would help educate consumers about the nature of their rights under the Communications Act. For these reasons, the Commission should grant the SBMS Petition as soon as possible after the close of the reply comment deadline.

DISCUSSION

I. State-Law Claims Challenging the Rates Charged By CMRS Providers Are Barred by Section 332 of the Communications Act

As the Petition observes, the Communications Act of 1934 has expressly preempted any state action to adjudge the lawfulness or appropriateness of the rates charged by cellular telephone carriers. Section 332(c) provides, in relevant part, that:

> "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service..." 47 U.S.C. § 332(c)(3)(A).

Consequently, state courts, as well as state regulatory commissions, lack jurisdiction to hear complaints regarding the lawfulness of the rates charged by cellular carriers. An action is no less state action because it is undertaken by a judicial, rather than an administrative, legislative, or executive branch of government.[3]

The practices challenged in the proceedings described in the Petition are on their face rate practices of CMRS carriers. In particular, rounding charges to per-minute (or smaller or larger) increments, or charging for incoming calls, are simply methods by which carriers determine how prices will be translated into revenues that recover their costs. The practice of charging for incoming calls, for example, is simply one pricing option preferred over charging a higher rate for outgoing calls and monthly service. And as noted in the

[3]See Petition, at 16, n.28, citing In Re Comcast Cellular Telecom Litigation, 949 F. Supp. 1193, 1201, n.2 (E.D. Pa. 1996)("Comcast").

Petition, charging in whole-minute increments is simply an alternative to charging a higher rate for smaller increments to yield the same revenue.[4]

Thus, any challenge to this practice is clearly a challenge to the level or reasonableness of the "rates" charged by CMRS providers. States are precluded from engaging in regulation of these matters. Moreover, granting any relief from these practices, either injunctive or in the form of damages, would involve state action to determine and set the rates charged by CMRS providers. Section 332 expressly precludes state authorities from engaging in this action as well.[5]

A number of courts have subscribed to this view when faced with similar challenges to CMRS carriers' rate practices. For example, in Comcast, the court dismissed for lack of jurisdiction a state court complaint alleging that the manner in which Comcast calculates the cost of cellular service is inconsistent with 'the custom and practice of most providers of telecommunications services.' The court found that the claims presented a direct challenge to the way in which Comcast calculates the rates which are charged for a given call, and that "any state regulation of these practices is explicitly preempted under the terms of the Act."[6]

Similarly, other state governmental authorities have held that state law claims alleging that a particular practice results in unjust or unreasonable rates were preempted by Section 332 of the Communications Act.[7] AirTouch was recently faced with a complaint at the California PUC involving a pricing practice, and asking the CPUC to

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[4]Petition at 8-9; Id., Appendix A.

[5]See Petition, at 16.

[6]949 F. Supp. at 1201.

[7]See, e.g., Lee v. Contel Cellular of the South, 1996 U.S. Dist. LEXIS 19636 (S.D. Ala.) (Nov. 25, 1996), para. 36; The Calif. PUC has stated that, with respect to CMRS carriers, "we will not entertain disputes regarding the level or reasonableness of any rate." "Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications," D. 96-12-071 (December 20, 1996) at 23.

prescribe that certain calls be provided free.[8] The CPUC concluded that the complaint would involve the CPUC in ratemaking for cellular services and must therefore be dismissed for lack of jurisdiction.[9] Accordingly, while the rulings SBMS requests are not novel, the Commission should grant the petition for a declaratory ruling in order to forestall further complaints of this type.

II. Charging for Incoming Calls And In Whole-Minute Increments are Established Practices That Are Just And Reasonable Under the Communications Act

AirTouch agrees with SBMS that the practices challenged in the Smilow case meet the standards of justness and reasonableness established in Section 201 of the Communications Act.[10] As SBMS notes, the proper standard for determining whether a pricing practice is "just and reasonable" asks whether the rate or practice challenged reflects competitive market operations, and is reasonably related to the cost of providing service.[11] Charging based on whole-minute increments and for incoming calls are practices that reasonably reflect competitive market conditions. These practices also reasonably reflect CMRS carriers' costs, as described by SBMS.[12]

The best evidence for this proposition is that CMRS providers operate in competitive market conditions. There are now at least four to five facilities-based broadband CMRS providers in most major markets. CMRS providers are differentiating themselves through new service and pricing packages, and prices are dropping for all service arrangements. Consumers have received these benefits because of competition,

[8] Richard Kashdan v. AirTouch et. al., D. 97-09-096 (September 24, 1997) at 6. The complaint concerned AirTouch's practice of charging customers for incomplete calls, including customers roaming on the AirTouch network, to recover the costs of setting up the communications channel involved in placing the call.

[9] Id., Conclusion of Law 3.

[10] Petition, at 6.

[11] Petition, at 7, citing "In re Petition of New York State Public Service Commission to Extend Rate Regulation," Report and Order, 10 FCC Rcd 8187, para. 17 (1995).

[12] Petition at 7-8.

not because of regulation. Any rate regulation, be it statutory, judicial or by an administrative agency, is more likely to harm consumers than to benefit them.

AirTouch and other CMRS providers are on record as supporting a service option known as "Calling Party Pays," ("CPP") that would reduce, if not eliminate, charges on incoming calls assessed on CMRS subscribers. Where customers select a CPP option, the costs created by an incoming CMRS call are recovered from the party placing the call. This arrangement is more economically efficient and benefits consumers. CPP is arguably a more fair arrangement, since it recovers the costs of the call from the party in the best position to value the call and decide whether or not to incur the costs.

But this does not automatically mean that charging for incoming calls is not a just and reasonable practices permitted by the Communications Act. As noted above, charging for incoming calls is reasonably related to the costs created, and is the recognized practice of a competitive market. Accordingly, the fact that CMRS carriers might generally prefer a CPP arrangement does not mean charging for incoming calls is unjust or unreasonable.

III. The Commission Should Grant the Petition As Soon As Possible

The Petition documents a significant number of class-action claims and other lawsuits pending in state courts, each raising the same request: to have a state court engage in prohibited rate regulation of CMRS carriers. Many involve the same practices of charging for incoming calls, in whole-minute increments, or other pricing practices established to be just and reasonable.[13] In order to eliminate the administrative burden on parties and courts alike, the Commission should grant the Petition and in so doing, make clear that these types of claims are without merit and can be disposed of summarily. Grant of the Petition should help to expedite consideration of some of these claims and discourage others, thereby freeing up judicial resources needed elsewhere.

Additionally, grant of the Petition should serve to educate the public about their rights under the Communications Act, and how the Commission is protecting their

[13] See, e.g., Petition, at 21-28.

interests through facilitating a competitive market for CMRS providers, rather than by permitting direct rate regulation of CMRS carriers' pricing practices. In addition to discouraging consumers from spending their resources on inappropriate court challenges, the increase in regulatory certainty caused by grant of the Petition will permit carriers to offer other innovative and competitive pricing plans with less fear that their price plans will be subject to court challenge.

CONCLUSION

The Commission should grant the SBMS Petition for the reasons stated above, and the facts and arguments presented in the Petition.

Respectfully submitted,

By: Kathleen Q. Abernathy

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January 7, 1998

Certificate of Service

I, Brian McGuckin, hereby certify that a copy of the foregoing Comments of AirTouch Communications, Inc. was sent by hand on this the 7th day of January, 1998 to the parties listed below.

Brian G. McGuckin

January 7, 1998

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